

GUIDELINES FOR CONFIDENTIAL DESIGNATIONS

INTRODUCTION

Over the years, the use of “confidential” designations within State civil service has expanded significantly. The centralized review of confidential designation requests by DPA made it apparent that the concept and purpose of confidential employees is not fully understood throughout State service.

In State service, “confidential” status exists **only** under the Ralph C. Dills Act (the State’s employer-employee relations statute). The definition of “confidential” is specifically and solely related to employer-employee relations and does not encompass confidential information, duties, or issues outside of employer-employee relations. Too often, State employees have been designated “confidential” because they work with information that must be kept confidential under privacy statutes, regulations, or departmental policies (i.e., information such as personnel records, investigative data, or other privileged information that may not be released to others or the public.)

The following guidelines are to assist state agencies and personnel with identifying positions that are properly designated confidential.

PURPOSE

The purpose of designating employees confidential is to assure the employer of the undivided loyalty of a small nucleus of individuals who can assist in developing negotiating positions and investigating and responding to employee grievances.

Confidential positions are positions that ordinarily would be part of a rank and file bargaining unit but have been removed from the unit to prevent a fundamental conflict of interest that would undermine the employer-union relationship in the collective bargaining process. Confidential positions are involved in the development of management positions (i.e., bargaining proposals) and represent management in the employer-union relationship.

CONFIDENTIAL DEFINED

The Dills Act provides the legal definition of “confidential employee”. Specifically, a confidential employee is “any employee who is required to develop or present management positions with respect to employer-employee relations or whose duties normally require access to confidential information contributing significantly to the development of management positions.”

Public Employment Relations Board (PERB) case law more particularly interprets the criteria for designating positions or employees as “confidential”. Specifically:

- a. PERB has determined that mere access to confidential information is not sufficient to confer confidential status. Access must occur as a part of the employee’s regular duties and must relate to employer-employee relations, a category that includes negotiations and grievance processing but not personnel records and evaluations.

- b. PERB has determined that confidential information is not acquired as part of regular duties if:
 - 1. the employee receives it from a personal acquaintance;
 - 2. the employee has only tangential contact with such information; or
 - 3. the employee's involvement with confidential information is not part of his/her job duties.
- c. PERB has determined that only a small number of employees needed to assist management in the development of bargaining positions will be given access to confidential information, including:
 - 1. Staff who gather data for negotiations proposals and have access to proposals and minutes of negotiating sessions.
 - 2. Secretaries who type documentation related to employee grievances and who attend grievance meetings on behalf of the employer.
 - 3. Secretaries who type and file correspondence or minutes that contain information about the employer's bargaining positions, which if revealed, would place the employer at a disadvantage with the exclusive representative of employees. (Frequently, the secretary's supervisor is a member of the negotiating team or has substantial input into negotiations strategy or proposals.)

CONFIDENTIAL DUTIES

It is a position's responsibilities and activities in the employer-employee relations discipline that determine whether or not a position is properly designated confidential. Such activities must constitute a significant portion of the employee's job assignment to support the confidential designation. A position performing such responsibilities only occasionally or a small portion of the time cannot support confidential status.

- I. Activities within State service that support confidential status include:
 - Participating on the management team in negotiations (State level or delegated meet and confers)
 - Notetaking at the bargaining table
 - Drafting proposals and contract language for negotiations
 - Participating in collective bargaining mediation and/or impasse resolution
 - Investigating and responding to grievances
 - Participating in grievance meetings

- Drafting and/or negotiating settlement agreements
- Presenting management positions at arbitration hearings
- Presenting management positions to the PERB at unfair labor practice, decertification, and/or unit modification hearings.

The following types of positions will typically support confidential status:

- Positions working in a labor relations office
- Positions performing “confidential” duties (as described above) as a frequent, routine, and significant portion of their regularly assigned duties
- Executive Secretaries, Executive Assistants, and Administrative Assistants to Executive Office management (first or second organizational level) who provide substantial input into negotiations strategy or bargaining proposals

Please note: The development of departmental policies and/or operating procedures does not constitute the development of management positions within the meaning of employer-employee relations. It is only when those policies and procedures must be negotiated with employee unions that the need for confidential status may arise. Thus, not every staff support position to policy-setting managers will warrant confidential status.

Confidential status is not supported solely by a direct reporting relationship to Executive management. The assigned duties provide the basis for confidential status.

II. Many activities within the human resources field have been used incorrectly to support confidential status in the past. These activities are subject to rules and regulations outside of the scope of the Dills Act and, therefore, fall outside the meaning of “confidential” in the Dills Act and do not support confidential status:

- Adverse actions, including Skelly hearings
- Classification analysis and Board item development, even when union input is necessary
- Position allocation, including out-of-class determinations
- Equal employment opportunity
- Workers’ compensation
- Examinations
- Personnel investigations
- Discrimination complaints

- Civil rights investigations
- Program budget analysis
- Health and safety investigations
- Maintenance of executive manager calendars or other private information that is not related to employer-employee relations.

The following types of positions most typically do NOT support confidential status, unless they are performing “confidential” duties as described in Paragraph I., above:

- Personnel analysts and other personnel office staff without labor relations responsibilities (e.g., positions responsible for classification and pay, examinations, adverse actions, workers compensation, return to work, FMLA, EAP, drug testing, or training functions)
- Personnel specialists and other transactions staff
- Secretaries to managers and supervisors in line programs, unless the manager or supervisor is in the direct line of authority over the Labor Relations function
- Internal affairs, equal employment opportunity, or civil rights investigators
- Budget or accounting staff
- Information technology staff
- Post and bid, transfer list, or hiring administrators

III. On rare occasions, if performed a significant portion of the time, the following duties may support confidential status, particularly when combined with other duties which are clearly confidential.

- Developing costing or budget information for management proposals
- Analyzing or drafting labor related legislation

Please Note: Departments must obtain concurrence from the appropriate DPA Labor Relations Officer before using these duties to support a confidential designation.

HOW MANY CONFIDENTIALS

There is no formula for determining how many confidential positions a department of agency should have. The number of confidential positions in a department is contingent upon a variety of factors, including, but not limited to:

- Size of the department’s labor relations office (number of analyst and specialist level positions)

- Level of employer-employee relations activity (e.g., activity of stewards, number of grievances, frequency of meet and confers, job actions, etc.)
- Number of locations or facilities, particularly if local meet and confers occur
- Department participation in statewide negotiations
- Size of department
- Departmental organizational structure
- Extent of involvement of executive management in employer-employee relations activities
- Number and type of bargaining units in the department.

SPECIAL CONCERNS

It is NOT appropriate to use “confidential” status as a “perk” for recruitment purposes. The position must perform confidential duties a significant portion of the time.

Equity between individuals within an office or within a classification is NOT a valid reason for designating a position as confidential. Individual designations must be based upon the duties and responsibilities assigned.

Most technical and analytical personnel office work does not support confidential status. However, on rare occasions, such as in the smallest departments where the personnel and labor relations functions are combined, it may be appropriate to designate personnel analyst staff as “confidential” if they routinely perform confidential functions.

THE RULE OF THUMB GUIDELINE

If the employee is able to reveal to the union the employer’s final bargaining position or the strategy for getting there, then the employee is properly designated as confidential.